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IN THE

Supreme Court of the United States

OCTOBER TERM—1965

No. 1317

JOHN S. BENDER,

Petitioner,

vs.

ORANGE LAND COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY

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Petitioner, John S. Bender, prays that a Writ of Certiorari issue to review the judgment of the Appellate Division of the Superior Court of New Jersey entered in the above entitled case on September 24, 1965.

Opinions Below

The opinion of the trial court is unreported, is printed in the Appendix in the court below, and is also printed as Appendix A herein.

The opinion of the Appellate Division of the Superior Court of New Jersey is unreported and is printed as Appendix B herein.

The denial of the petition for certification and the dismissal of the appeal by the Supreme Court of New Jersey is reported in part at 46 N. J. 337, 217 A. 2d 13, and is printed as Appendix C herein.

Jurisdiction

The decision and affirmance by the Appellate Division of the Superior Court of New Jersey, sought to be reviewed, and printed as Appendix B herein, was entered on September 24, 1965. The petition for rehearing was denied on October 4, 1965.

The denial of the petition for certification and the dismissal of the appeal by the Supreme Court of New Jersey, printed as Appendix C herein, was entered on February 16, 1966. The petition for rehearing was denied on April 4, 1966.

The jurisdiction of this Court is invoked pursuant to 28 U. S. Code, Section 1257 (3).

Questions Presented

Whether the "due process" and "equal protection" clauses of the 14th Amendment to the Federal Constitution are violated by a State court decision:

(1) Arbitrarily and capriciously contrary to undisputed facts?

(2) Arbitrarily and capriciously disregarding appellate precedent?

(3) Arbitrarily and capriciously failing to adjudicate the defense to a foreclosure?

Constitution Provisions Involved

United States Constitution, Amendment 14th, Section 1, Clause 3:

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This litigation involves a combined suit in equity by plaintiff to foreclose a purchase-money mortgage relative to a six-family income property, and a counterclaim at law by the defendants for damages for fraud in misrepresenting the fuel oil expense, and for breach of covenant against encumbrances in the deed because of existing housing violations which had been specifically provided against as encumbrances in the contract of sale.

Though the trial court found the plaintiff guilty of fraud in misrepresenting the fuel oil expense in the sale of the property, it awarded damages to the defendants based on the "out-of-pocket" rather than the "benefit-of-the-bargain" rule of damages by concluding, contrary to the undisputed expert testimony of both parties, that the 20% rate of return anticipated by the defendants on their cash investment was "completely unreasonable" (7a-2). (Point I)

Next the trial court denied defendants right to recover damages caused by the existing housing violations by rejecting the prevailing appellate precedent that housing violations are encumbrances when specifically provided against in the sales contract with the unfounded criticism that same was "at best ambiguous" (10a-23). (Point II)

Finally, the trial court summarily allowed a foreclosure of the mortgage without ever deciding the crucial undisputed defense that the nonpayment of taxes which had been asserted as the default was causally related to the plaintiff's own fraud in that the increased fuel oil expenses which had been fraudulently misrepresented actually prevented the payment of the taxes due. (Point III)

The defendants' appeal to the Appellate Division resulted in a single paragraph opinion affirming the entire judgment by reference only to the very same decision of the trial court. The petition for rehearing was denied.

The petition for certification to the New Jersey Supreme Court as to Points I and II was denied, and the appeal to that same Court filed as of right because of the claimed deprivation of "due process" and "equal protection" guaranteed by the 14th Amendment to the Federal Constitution by arbitrary and capricious State action was dismissed at the same time without hearing or opinion. The petition for rehearing as to Point III only, since same had not been argued in the certification petition, was denied.

Reasons for Granting Certiorari

This Petition seeks a review of the decision below because the reasons set forth (Points I and II) and the failure to decide the crucial defense (Point III) are so arbitrary and capricious as to constitute a deprivation of property rights by a State authority in violation of the "due process" and "equal protection" guarantees of the 14th Amendment to the United States Constitution.

That judicial decisions of a State court are such an exercise of State sovereignty as must satisfy the substantive and procedural safeguards of the 14th Amendment is an only too well established principle of Federal Constitutional Law.

Moreover, that any such arbitrary and capricious deviation from those fundamental forms of administering justice as have been established by the law of the State may violate the protective guarantees of the 14th Amendment has been recognized in the Federal appellate decision of *Williams* v. *Tooke,* 108 F. 2d 758 (5th Cir., 1940), cert. denied, 311 U. S. 655 (1940), involving as in the instant case the invalidation of a mortgage foreclosure, as follows:

> "However, *if a case between private parties is arbitrarily and capriciously decided, in violation of settled principles of law and contrary to undisputed facts,* though the court so deciding had jurisdiction over the suit, the judgment may be a violation of the 14th Amendment." (Emphasis added.)

To the precisely same effect the United States Supreme Court in the stock transfer case of *American Railway Express Company* v. *Kentucky,* 273 U. S. 269 (1927), has in similar language again noted the right to such protection of private property from a judgment which:

> "amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' "

Hence, the highest Court of New Jersey has thus acknowledged the Federal Constitutional mandate requiring the uniform application of settled common law principles to the same factual situations, and in *Hague* v. *Warren,* 142 N. J. Eq. 257, 59 A. 2d 440 (E. & A. 1948), involving discovery in aid of defending a libel suit, stressed the commanding force of judicial precedent as follows:

> "*All litigants in equity are now entitled to the same result in identical situations, and the claim to that*

> *result has the stature of a right.* 'For if the constitutional provision, "due process of law", or, as it is sometimes called, "the law of the land", or, as the English phrase it, "the rule of law," means anything, it should mean equality in the determination of the rights of those affected.' * * * *Equity, no less than law, is bound to follow established principles.*" (Emphasis added.)

Still further, and with particular pertinence to the instant case, another New Jersey decision, *Greaves* v. *Fogel*, 9 N. J. Super. 301, 74 A. 2d 350 (Ch. Div. 1950), in resolving an asserted conflict of laws relative to the inheritance of real estate, emphasized the increased dominance of *stare decisis* in determining property rights:

> "The doctrine of stare decisis applies with particular force and strictness to decisions which have determined questions concerning real property and vested rights."

The extent to which the decision below thus constituted an arbitrary and capricious departure from the established substantive and procedural judicial principles prevailing in New Jersey is manifest in the following three instances urged as grounds for review herein—each of which involves an asserted violation of the 14th Amendment.

POINT I

The decision below is arbitrarily and capriciously contrary to undisputed facts.

While the court below acknowledged the right to recover damages for the seller's fraud in misrepresenting the fuel oil expense in the sale of an income property

according to the "benefit-of-the-bargain" rule set forth by the New Jersey Supreme Court in *Zeliff* v. *Sabatino,* 15 N. J. 70, 104 A. 2d 54 (1954), reversing 27 N. J. Super. 13, 98 A. 2d 679 (App. Div. 1953), it rejected same in the instant case because of an arbitrary and capricious determination that the 20% net return anticipated by the defendants' on their cash investment was "completely unreasonable" (7a-2).

However, the undisputed evidence unequivocally establishes that the anticipated return of 20% on the cash investment of $5,500, amounting to $1,100 per year, was considered reasonable in the opinion of all three expert witnesses, including the plaintiff's (D48a-31; D49a-10; D54a-12; D67a-32; D68a-7; D68a-21).

Moreover, the expert testimony also recognized that a return of 11% on the cash investment in the six-family building herein was "normal" and hence apparently reasonable, and that a return of 20% was also "fair":

> "In the instant situation, one expert testified that in purchasing a multi-family dwelling of this type *the buyer would normally anticipate a return of eleven per cent on his cash investment,* while another testified that *twenty percent return on the cash investment was fair,* * * *." (Emphasis added.) (6a-14 to 19)

But instead of finding that the 20% anticipated herein was thus reasonable, the decision under review reached the very opposite conclusion as follows:

> "* * * defendants in their estimate of anticipated return made no provisions for vacancies or for normal maintenance repairs to a building estimated at between forty and eighty years of age and con-

taining about 46 rooms. If such obvious expenses and losses were included in the operational expenses, the anticipated net return of $1,100 would be substantially reduced." (6a-22 to 28)

Since such reasoning questions only the method of arriving at the 20% net return figure, a closer analysis of the undisputed proofs not only fully supports defendants' computations, but demonstrates that even with the inclusion of theoretical allowances for "vacancies" and "repairs" the anticipated return would still not vary significantly from the 11% return conceded to be "normal."

Firstly, the undisputed testimony shows that the defendants were justified in omitting any allowance for vacancies in their initial computation based on the seller's own indication that it "always had a waiting list for tenants" (P202a-15). Surely the plaintiff cannot be heard to assert the contrary.

Secondly, the uncontroverted proof shows that the defendants' anticipated return included a $600 per year allowance for the services of a tenant-superintendent who did work for the seller on other properties (P202a-23 to 25). With the continuance of such services defendants were again justified in minimizing any additional allowance for "normal maintenance repairs" to a six-family dwelling for purposes of estimating their annual current net operating income.

Finally, the plaintiff's own expert witness arrived at his appraisal based on net income by including as expenses a theoretical 3% vacancy loss of $230 (P298a-18), and a 5% repair allowance of $375 (P299a-20). Even if both of these theoretical items are included in the expenses anticipated by the defendants in the instant case, the net

return would still approximate $500 or about 9% of the cash investment and would again almost coincide with the 11% "normally" expected. And if only the theoretical expense item of $375 for repairs was added, the net return of about 13% would still remain well within the undisputed range of reasonableness.

Hence the decision under review in arbitrary and capricious contradiction of the undisputed facts constitutes State action clearly violative of the protective safeguards of the 14th Amendment to the Federal Constitution.

POINT II

The decision below arbitrarily and capriciously disregarded appellate precedent.

The New Jersey law imposing liability upon the seller of real property for the existence of housing violations to which the property is subject at the time of the conveyance holds that the identical language of the sales contract relative to housing violations involved in the instant case had the legal effect of providing against same as encumbrances, rendering the title to the property unmarketable. It was thus in the case of *Moran* v. *Borrello*, 4 N. J. Misc. 344, 132 A. 510 (Sup. Ct. 1926), that the New Jersey intermediate appellate court in affirming the recovery of damages for existing housing violations, quoted verbatim the pertinent part of the very same contract clause herein, and in the most concise and certain language explicitly held:

> "* * * in any event they (housing violations) were specially provided for as an encumbrance in the contract of the parties."

Contrary to the clear and unmistakable wording of this standing rule of law permitting no alternative interpretation whatsoever, the court below summarily rejected its binding force with the following critical comment:

> "This wording, relied on so heavily by defendants, is at best ambiguous." (10a-23)

Such a cursory and unjustified disparagement of the unaltered pronouncement of an appellate tribunal cannot destroy the compulsory mandate of *stare decisis* requiring the same legal effect to be accorded the same contractual clause.

Rather such arbitrary and capricious disregard of the controlling force of prevailing appellate precedent constitutes State action plainly violative of the "due process" and "equal protection" guarantees of the 14th Amendment to the Federal Constitution.

POINT III

The decision below arbitrarily and capriciously failed to adjudicate the defense to the foreclosure.

While the uncontroverted proofs establish that the alleged default in the payment of taxes upon which the foreclosure herein is based was a direct result of the lack of funds caused by the increased fuel oil expenses which had been fraudulently misrepresented by the plaintiff, neither the trial court nor the Appellate Division made any determination whatsoever of such causal relation between the plaintiff's fraud and the unpaid taxes, which causal relation was asserted as a complete defense to the foreclosure. It is the following excerpt from the undis-

puted testimony for the defendants which most clearly demonstrates such causal relationship:

> "*By the Court*:
>
> Q. You didn't pay the taxes because of lack of funds, is that correct? A. Caused by the plaintiff's fraud. (D60a-20, 21)
>
> * * *
>
> A. * * * The fraud, may it please the Court, diminished our income * * *.
>
> Q. How did the fraud diminish your income? (482) A. The oil expenses were greater." (D61a-5 to 9).

Notwithstanding the finding that the plaintiff's fraud caused an "out-of-pocket" loss to the defendants of $4,000 and that they were entitled to be reimbursed accordingly; together with such uncontroverted evidence showing the causal relation between the lack of funds caused by the plaintiff's fraud and the self-same lack of funds which actually prevented the payment of an even lesser amount of taxes, the decision below arbitrarily and capriciously allowed a foreclosure based on the very same unpaid taxes without ever deciding the crucial issue of that causal relationship.

The established mode of common law procedure in the courts of New Jersey requires that all parties to litigation be afforded not only the basic requisites of notice and hearing so fundamental to the preservation of the "law of the land" as we know it, but also implicitly requires that every issue raised be resolved and adjudicated. Indeed any failure to adjudicate a given issue would be in effect tantamount to a denial of the right to the hearing itself

since one could not protect a party without the other. Just as a denial of either notice or an opportunity to be heard constitutes a denial of a party's "day in court", so also would the failure to decide an asserted defense withhold the realization of such protection.

This interrelationship between the elemental requisites of our system of judicial procedure has been most logically set forth by the United States Supreme Court in the confiscation case of *Windsor* v. *McVeigh,* 93 U. S. 274 (1876), as follows:

> "But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak; if he has anything to say, why the judgment sought should not be rendered. A denial to a party, of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham and deceptive proceeding had better be omitted altogether. It would be like saying to a party: appear, and you shall be heard; and, when he has appeared, saying; your appearance shall not recognized and you shall not be heard."

In accordance with such basic requirements affording a party the inviolate right to his "day in court", the implicit right to therein obtain a ruling upon the defense raised has been recently recognized in *United States* v. *Weir,* 235 F. Supp. 306 (E. D. Ark. 1964), affirmed, 339 F. 2d. 82 (8th Cir. 1964), as follows:

> "But, every contention that he has advanced has been considered carefully, to the extent that Weir was entitled to have it considered in this action, and his contentions have been passed upon in the manner in which such contentions are usually handled in this District under the local rules of the Court."

Cognizant of such fundamental justice, the applicable Court Rule governing non-jury trials in New Jersey precisely requires the court to thus decide all issues:

"Revised Rule 4:40-2 Trial by the Court.

> * * * *all issues of fact* not triable of right by a jury *shall be decided by the court* without a jury * * *." (Emphasis added.)

In addition the applicable Court Rule controlling appellate procedure in New Jersey similarly required the Appellate Division at the time it rendered the opinion below to set forth the reasons for its decision:

"Revised Rule 2:9-1 Opinion, Judgment and Mandate.

> (a) Upon the final determination of any cause *the court shall prepare and file an opinion of the reasons for its decision.* * * *" (Emphasis added.)

Since the trial court made no reference whatsoever to the defense to the foreclosure based on the undisputed causal relation between the plaintiff's fraud and the nonpayment of the taxes alleged as the default, the decision of the Appellate Division below by referring only to the trial court's opinion simply compounded the omission of any ruling on that issue.

To thus deprive a party of his property by foreclosure without ever deciding the all-important issue asserted as a complete defense thereto constitutes such arbitrary and capricious State action as categorically violates the fundamental protective safeguards of "due process" and "equal protection" so zealously guaranteed by the 14th Amendment to the United States Constitution.

CONCLUSION

For all of the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN S. BENDER,
Counsel Pro Se.

APPENDIX A

Opinion of the Trial Court

(October 30, 1963)

MINTZ, Judge.

The plaintiff seeks to foreclose a real estate mortgage covering premises known as 181 Central Avenue, East Orange, New Jersey. Defendants deny the existence of any default in the monthly mortgage payments of interest and principal at the time of the filing of the complaint. While they admit failure to pay the 1961 and the first half of 1962 real estate taxes, they contend that plaintiff waived the payment of the same so that a judgment to foreclose cannot be entered. Additionally, defendants counterclaim asserting that plaintiff maliciously interfered with defendants' rights of ownership and did disparage defendants' title; that plaintiff through its president, the late Edward Backes, fraudulently misrepresented that there were no housing violations existing with respect to the subject premises; that prior to the signing of the contract plaintiff misrepresented the amount of fuel costs in connection with the operation of the subject premises.

The counterclaim further asserts a surreptitious attempt to obtain an illegal execution against the property and additionally a claim for waste while the mortgagees were in possession of said premises. No proof of waste was presented and this claim was abandoned. An accounting is also sought by defendant respecting the income received and disbursements made by plaintiff as mortgagee in pos-

session since July 1962. Defendants counterclaim for compensatory and punitive damages. Plaintiff entered a general denial to all the allegations in the counterclaim.

The subject property, known as 181 Central Avenue, East Orange, New Jersey, is a three-story frame building with a stucco exterior consisting of six apartments, two on each floor, containing a total of 46 rooms. The property was owned by plaintiff for several years. The late Edward Backes, president of Orange Land Company, actively managed the property and conducted the affairs of this corporation. He died on May 5, 1963. During his lifetime he decided to sell the subject property and inserted a newspaper ad to this effect, through which medium defendants became interested in acquiring same as an income-producing investment.

Their negotiations culminated in a contract dated May 2, 1960, wherein the Benders agreed to pay plaintiff $37,500. The down payment was $5,500, the balance payable by a mortgage with interest at six per cent. The mortgage was of the direct reduction type, calling for payments of $275 monthly. The contract provided for the seller to convey the property to the purchaser by deed of bargain and sale free from all encumbrances. There was no closing date specified.

The contract also contained the following pertinent provisions: "This contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality * * * It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described

in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the Department or Board enforcing the same where such ordinances, regulations, and said Act apply."

Respecting the alleged fraudulent misrepresentations as to the fuel oil costs, Mr. Bender insisted that prior to closing title Mr. Backes represented the annual fuel oil consumption averaged about $950 to $1,000. He further testified that his first annual fuel bill for the period July 26, 1960, to July 26, 1961, amounted to $1,614, and for the following year $1,635, and this after the installation of storm windows. He estimates the actual fuel consumption would have been $1,770 had storm windows not been installed. Mr. Rolzhausen, a representative of the fuel company that furnished oil to the subject premises at the request of Mr. Backes for a few years prior to the sale to the Benders, testified from his records that the fuel oil delivered during the calendar year 1958 amounted to $1,326.55, and in 1959 to the sum of $1,440.37. The records likewise indicate that for the period June 1959 to June 1960 inclusive the actual fuel charges incurred amounted to $1,390.60.

Mr. Bender testified that prior to signing the contract he made inquiry respecting the expenses on the property and that Mr. Backes told him the fuel oil costs were $950 to $1,000. Mr. Backes offered to show Mr. Bender the fuel oil bills, but Mr. Bender declined, relying on the oral representation. The type of disclosure Mr. Backes would have made cannot be determined, of course. At the time Mr.

Bender signed the stipulation of dismissal on April [sic: July] 28, 1961, in the earlier foreclosure proceeding initiated by the Orange Land Company, he voiced no complaint on this issue to Mr. Backes. As a matter of fact, between July 26, 1960, and July 1, 1962, he never charged Mr. Backes with any fraud. The complaint in this proceeding was filed in June 1962, and it was not until November 1962, by leave of the Court, that the defendant filed a counterclaim in which the charge of fraud was asserted.

Mr. Bender did not satisfactorily explain his failure to assert his knowledge of the misrepresentation to Mr. Backes at any time prior to July 1, 1962. Normally one would expect that representations as to operational expenses for the property if made would be included in the written contract, but Mr. Bender testified that he had confidence and relied upon the representation of a fellow member of the Bar. My observation of Mr. Bender on the witness stand impels the conclusion that Mr. Backes did in fact misrepresent the fuel oil costs and that Mr. Bender relied upon the same. His testimony is uncontradicted on this point, since Mr. Backes died prior to the actual trial. I do not believe that Mr. Backes warranted to Mr. Bender future fuel costs. They are dependent upon many unpredictable items, such as price per gallon, which varies with the quantity of the purchase, and weather conditions. The Court is accordingly not concerned with Mr. Bender's fuel costs. The misrepresentation was only in connection with plaintiff's experience. The actual misrepresentation predicated on the one-year costs immediately preceding the signing of the contract was $390.60.

Mr. Bender testified that on the basis of the figures submitted to him he anticipated a net profit of $1,100 on a

$37,500 investment. Thus, there would be an anticipated return of twenty per cent on a cash investment of $5,500 (after deducting amortization and interest payments on a $32,000 mortgage), and an anticipated return of about three per cent on the purchase price. He figured the actual fuel costs at $1,770 per year, and that the amount of misrepresentation was $770 per year. He invoked the "benefit-of-the-bargain" rule enunciated in *Zeliff* v. *Sabatino*, 15 N. J. 70 (1954), where the Court said: "The resultant loss, therefore, is that sum which, when subtracted from the purchase price paid, produces the sum which would yield the same net return anticipated by the plaintiff when he made his purchase. That sum would be computed by the capitalization of reduction in net income." On the basis of this formula, Mr. Bender figures his loss by the capitalization of reduction in net income, arriving at a figure of $27,333.

In *Zeliff*, the Court further said at page 74: "The sum required to fairly compensate the plaintiff for the loss suffered as the natural and proximate result of the fraud would be the amount of capital required to yield the annual differential in income at the anticipated rate of return, provided, of course, that the proofs establish that the rate of return was reasonable." The Court further said in the course of its opinion, and I quote, "As to some cases, what is called the 'out-of-pocket' rule may furnish just and adequate compensation; in others the so-called 'benefit-of-the-bargain' rule may be the more just and accurate. The just method of determining damages necessarily varies with the facts of the particular case, and damages in a case such as this, which deals with an over-payment in the purchase price of property as the result of a fraudulent misrepresentation, are to be assessed in the amount of the

loss occasioned by that misrepresentation. No rule of damages capable of precise application in all cases can be laid down and followed. If a charge of fraud is sustained, all damages which are the proximate result of the wrong should be awarded. 'Regardless of whether the out-of-pocket rule or the benefit-of-the-bargain rule is the correct one, the fundamental rule universally employed' * * * is that 'the victims of fraud are entitled to compensation for every wrong which was the natural and proximate result of the fraud.' If one or the other rule is inflexibly adhered to, while certainty would be achieved, it would in many instances be at the expense of justice."

If, of course, as indicated in *Zeliff*, the rate of return is unreasonable, the formula cannot be applied. In the instant situation, one expert testified that in purchasing a multi-family dwelling of this type the buyer would normally anticipate a return of eleven per cent on his cash investment, while another testified that twenty percent return on the cash investment was fair, after making allowances for all operating expenses including amortization and interest payments on the mortgage. Additionally, defendants in their estimate of anticipated return, made no provisions for vacancies or for normal maintenance repairs to a building estimated at between forty and eighty years of age and containing about 46 rooms. If such obvious expenses and losses were included in the operational expenses, the anticipated net return of $1,100 would be substantially reduced. Under the benefit-of-the-bargain rule, the lower the anticipated return, the greater the recovery. To capitalize a loss of reduction in net income on the basis of a two per cent or three per cent return quite obviously projects a completely unrealistic figure on this type of investment.

Appendix A

I find that the rate of return anticipated by the Benders was completely unreasonable and hence the benefit-of-the-bargain rule cannot be applied. In this posture the Court is obliged to apply the out-of-pocket rule, namely, the difference between the price paid and the actual value of the property acquired.

Mr. Jack B. Goldsmith, a real estate broker and appraiser of considerable experience, testified for plaintiff. He inspected the subject property for the first time in the course of the trial and stated that the property had a value of $41,000 as of July 31, 1960. Mr. William Atkinson, a real estate broker of limited experience, testified for defendants that if the subject property showed an annual return of $1,100, it would be worth between $26,000 and $27,000.

Mr. Goldsmith viewed and appraised the premises after substantial repairs and improvements were made therein. He should have made some allowance for the same in arriving at his appraisal of $41,000. In other respects, Mr. Goldsmith's testimony was impressive. I find on the basis of all the pertinent testimony presented the actual value of the property at the time of acquisition by the Benders to be $33,500, and that consequently defendants suffered a resultant loss of $4,000.

The testimony failed to disclose any misrepresentations committed by Mr. Backes or anyone on behalf of the seller respecting housing violations. Mr. Bender frankly testified that in connection with his inquiry respecting housing violations, Mr. Backes gave him an ambiguous reply. This surely should have alerted Mr. Bender and clearly negatives any reliance on his part. Prior to the closing of title, there were occasions when Mr. Backes was accused of cer-

tain violations of the code, but these were corrected at the time of the signing of the contract and the delivery of title. There were no housing violations open of record against Orange Land Company at the closing date.

Mr. Bender urged that the housing violations constituted a breach of covenant in the deed, and he sought to hold plaintiff accountable for such breach of covenant and not on the theory of fraud. Significantly, there is no general covenant against encumbrances, the type that is usually contained in a warranty deed, included in the deed delivered to the Benders. They did receive the deed they bargained for, namely, a bargain and sale deed, dated June 30, 1960, which contained the usual covenant against acts of grantor and which reads as follows: "And the said grantor, Orange Land Company, a New Jersey corporation, for itself, its successors and assigns, does covenant, promise and agree to and with the said grantee, their—and assigns, that it has not made, done, committed, executed, or suffered any act or acts, thing or things, whatsoever whereby or by means whereof the above-mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered, in any manner or way whatsoever."

The City of East Orange adopted a housing code effective April 1960, but which was not administratively enforced until July 1960. An inspection of the property was made by the municipal authorities on August 24, 1960, and disclosed the following violations of the housing code: "Garbage, trash, refuse around exterior. Bushes overgrown. Fences need repair. Chimney unsound. Porches and steps need repair. Walls need repair and paint. Roof needs repair. Basement damp. Rats and roaches in evi-

dence. No screens for all doors and windows. Accumulations in areaways, porches, hallways. Cracks in basement floor. Must be 4" concrete. Loose plaster. Interior walls unsanitary. Interior stairs defective. No light for stairs. Garbage cans are not waterproof. No janitorial service. Plumbing clogged up. Heating system needs repaid. Insufficient electric service. Exposed wiring."

Thereafter, defendants were subject to several complaints preferred against them by the municipal authorities for failure to correct said conditions. They were fined and incurred substantial expenditures to correct the alleged defective conditions. Mr. Bender testified that approximately $10,000 was expended to correct such violations. The expenditures covered exterminating service, the installation of storm screens, repairs to the heating system, roofing, plumbing, plastering, painting, stucco repairs, and miscellaneous general repairs. It is difficult to determine just what amount was actually expended to correct the alleged housing violations and what amount was actually expended by defendants by way of normal maintenance and improvements to the subject property. However, in view of my interpretation of the law, it is unnecessary to make this determination.

As already observed, the contract of sale between the parties specified that there were no tenement house violations. Nevertheless, defendants cannot rely on this contractual provision, for *Bogert* v. *Citizens First National Bank, etc., Co.*, 131 N. J. L. 218 (E. & A. 1944), held that such a provision merged in the deed. Defendants thus rely on the covenant contained in the deed. They contend that such violations constitute encumbrances. None of the cases cited by defendants hold that such a violation is an encum-

brance as the word is used in a covenant in a deed. The cases cited by defendants relate to breaches of a contract to sell realty or for an abatement of the purchase price. In such instances courts have been unanimous in finding that tenement house violations constitute a material breach of contract and in so doing have in dictum stated the breach is an encumbrance.

A close examination of defendants' cases is in order. In *Bier* v. *Walbaum*, 102 N. J. L. 368 (E. & A. 1926), the Court did not find a housing violation to be an encumbrance as indicated by defendant. There the Court defined encumbrance contrary to the position of defendants. It held at page 370 that, " 'encumbrance' means a right to, or an interest in an estate to the diminution of its value. A paramount claim or interest resting as a charge upon land." The Court in *Moran* v. *Borrella*, 4 N. J. Misc. 344 (Sup. Ct. 1926), in finding tenement house violations a material breach of the contract, said: "They were sufficiently substantial to justify the defendants in making an allowance therefor, and in any event they were specially provided for as an encumbrance in the contract of the parties." The wording, relied on so heavily by defendants, is at best ambiguous. It may be that the Court there referred to the contract which specifically labeled the housing violations as encumbrances.

In *Strell* v. *Zisman*, 5 N. J. Misc. 427 (Ch. 1927), Vice Chancellor Backes said that a covenant in a contract to purchase realty, if violated and immediately repaired by the seller, would not permit the purchaser relief from his contractual obligation. The learned Vice Chancellor said: "The covenant that the building comply with the Tenement House Act was of no greater effect than the usual one with

respect to encumbrances. Such a comparison does not permit a conclusion that tenement house violations are encumbrances, but seems to indicate that they are not encumbrances, only that the effect of each is the same.

Defendants' citation of *Kaplan* v. *Labor Nat. Bank of Jersey City,* 125 N. J. L. 63 (Sup. Ct. 1940), never once discusses what constitutes an encumbrance although finding that tenement house violations are a material breach of contract. Obviously, that case would be of no aid to defendants' position.

In *Jersey Estates Corporation* v. *Weintraub,* 140 N. J. Eq. 216 (Ch. 1947), the Court said: "The parties agree that the alleged defects in the building are not an encumbrance or a cloud on the title and that a conveyance of the property in the condition disclosed by the reports would be a fulfillment of the defendants' obligation to convey a marketable title, free from all encumbrance." The defendants attempt to dismiss the statement for as indicated the Court said, "The parties agree." This, say, the defendants, clearly establishes that the Court has not spoken. It seems doubtful that the Court would adopt the parties' agreement to what the law is without agreeing with the position taken. The statement in *Weintraub* is more convincing than the ambiguous declaration in *Moran, supra,* which is the sole case hinting that a tenement violation is an encumbrance.

As in the preceding cases cited by defendants, *Dixon* v. *Ober,* 141 N. J. Eq. 289 (Ch. 1948), does not support their position. In fact, the Court identifies a contractual representation concerning tenement violations as a guarantee, not even mentioning the term encumbrances. *Burns Trading Corp.* v. *Blue Front Market,* 17 N. J. Super. 61 (Law Div. 1951) cited by defendant as a modern affirmance

of *Bier, supra,* is in fact such a case. However, as indicated, *Bier* is actually adverse to defendants' position, for it defines encumbrance as any right or interest in an estate to the diminution of its value. To the same effect see *LaSalle* v. *La Pointe,* 14 N. J. 476 (1954), cited by defendant.

Matyce v. *Nemecz,* 131 N. J. L. 173 (Sup. Ct. 1944), is likewise clearly distinguishable in that the case merely held that unpaid taxes and water charges constitute an encumbrance and a breach of the covenant in the deed. This is obviously so since such items are liens against the title, which is not true of housing violations. The decisional law in New Jersey does not support defendants' contention that Tenement House violations or violations of a Municipal Housing Code constitute an encumbrance as that term is used in a bargain and sale deed containing a covenant against acts of grantors as hereinabove recited.

I am satisfied that such violations do not affect the title to or any interest in the land and hence are not encumbrances within the meaning of that term as used in the covenant against acts of grantors in a bargain and sale deed. Support for this view is found in decisional law of sister states.

In *Stone* v. *Sexsmith,* 184 P. 2d 567 (1947 Washington), the parties entered into a contract to purchase real estate upon which there was a hotel. Subsequent to the execution of the contract and prior to the conveyance, the defendant sellers were informed that the wiring in the hotel was defective and that the State would insist upon certain extensive charges. This information was not conveyed to plaintiff purchasers. The deed contained a covenant against encumbrances. (The deed before this Court does not contain such a covenant. Our deed merely has a covenant

against the grantor's act which has within it a provision that the property is without encumbrances.) The Washington court found that these defects in the building are not encumbrances. In so finding, it said, "While electric, plumbing, sanitary, fire, safety and building inspectors and perhaps others, may restrict or prohibit the use of property in the exercise of the police power, we know of no case holding that such restrictions or prohibitions constitute a breach of a covenant against encumbrances * * *"

The Court goes on to cite 21 C. J. S., Covenants, Section 98, p. 955, with approval: "* * * a claim for breach of covenant cannot be predicated on the condition of the premises as to dilapidation or the existence of a nuisance or the necessity of repair or alteration to conform to building laws." The Washington court, in further supporting its holding, quoted at length *Berger* v. *Weinstein,* 63 Pa. Super. 153 (Penn. 1916). In *Berger,* the defendant was ordered to construct a nine-inch building wall which he failed to do prior to conveying the property to plaintiff. In plaintiff's suit to recover costs in building the wall, the Court found that such a failure did not constitute an encumbarnce within the covenant contained in the deed (covenant against encumbrances).

The Court stated: "An encumbrance is any right to, or interest in, land which may subsist in third persons to the diminution of the value of the estate of the tenant but consistently with the passing of the fee * * * Familiar illustrations are mortgages, judgments, and other liens, leases, executory contracts of sale and taxes assessed * * * But whether lien, easement, or otherwise, the impediment is a right to, or interest in, land * * * It is not claimed that any lien existed at the time the defendants conveyed

the property, nor was there any easement. The defect alleged was a condition of a portion of the party wall in violation of the building law." The Court then went on to point out that if a covenant against encumbrances included building violations, the seller would become a warrantor that the building complied with all building laws, an absurd position, said the Court; for with so many regulations, invariably there would be some violations.

The case of *Silverblatt* v. *Livadus,* 164 N. E. 2d 875 (Sup. Ct. of Mass. 1959), cannot significantly shed light on the issue before this Court. In *Silverblatt,* the Court distinguished between a covenant which reads, "encumbrances made or suffered by the grantor" and a covenant which does not contain the word "suffered," saying that without the word "suffered," a building violation which the grantor failed to correct could not be covered by the covenant. The Court interpreted the word "made" as requiring an act of commission. It further stated that it would not comment on a covenant which includes the word "suffered." (The covenant before this Court includes the word "suffered.")

Brunke v. *Pharo,* 39 N. W. 2d 221 (Sup. Ct. Wisc. 1958), is the sole authority which can possibly be considered as supporting the defendants' position. However, a close examination of the case establishes that it is clearly distinguishable.

In *Brunke,* the deed contained a covenant which stated, "The (premises) are free and clear from all encumbrances whatever." Initially, it should be observed that this covenant is far broader than the covenant before this Court. But of even greater significance is the Court's approval

of *Berger, supra,* and *Sexsmith, supra.* Thus, when the Court found that the housing violation was within the definition of encumbrance, it stated: "The situation seems somewhat different where official action has been taken before the conveyance, so that enforcement action is imminent when the deed is delivered." This all-important factual distinction is, of course, absent in the case before this Court. Thus, the applicable decisional authorities from other jurisdictions are *Sexsmith* and *Berger, supra,* and support the conclusion of this Court to the effect that housing violations do not constitute encumbrances violative of the quoted covenant in the deed.

Defendants stressed the fact that notwithstanding the entry of a stipulation of dismissal on April 28, 1961, in the earlier foreclosure proceeding initiated by the Orange Land Company, the plaintiff *ex parte* through its late president, Edward Backes, an attorney at law, endeavored to procure the issuance of an alias execution by the Sheriff of Essex County; that an application in furtherance thereof was made to Judge Donnelly; and that an *ex parte* application in connection with that earlier judgment was likewise made to me. However, in each instance the *ex-parte* application was unsuccessful. The point is made that such conduct constituted a malicious endeavor on the part of plaintiff to deprive the defendants of their property interest and that generally this type of conduct indicates malice on the part of the plaintiff. I reach no such conclusion from the testimony.

The applications were made in connection with a judicial proceeding. The alias execution did not issue and defendants were not in any wise hurt by such unsuccessful *ex parte* applications. It was urged that the first foreclos-

ure proceeding was a sham, that there was no default. Yet, Mr. Bender voluntarily paid a counsel fee of $250.00 to the plaintiff and entered into a stipulation of dismissal. I conceive no basis upon which any claim for damages can be sustained in favor of defendants by virtue of Mr. Backes' conduct in connection with the first foreclosure proceeding.

Additionally, defendants urge that Mr. Backes maliciously interfered with defendants' rights of ownership and disparaged the defendants' title. While the mortgagee was in possession, Mr. Bender had listed the subject property for sale and had arranged for real estate agents to show the property to prospective purchasers. Eleanor Gorney, a real estate sales agent with Frankel-Weber company, real estate brokers, to whom the Benders gave an exclusive listing of the property, showed the premises to a prospective purchaser in September 1962. Mr. Backes chanced to be there at the time and told her that he held a mortgage on the property, that she had no right to be there, that the property was not for sale, and that Mr. Bender had no right to sell the property. She returned to her office and phoned Mr. Bender, advising him of what took place. Thereafter, the prospect did call her and said he was interested and submitted an offer which she in turn communicated to Mr. Bender.

Mr. Bender told her that the offer of $35,000 sounded good, and that it could be worked out. Mr. Bender was given the name of the prospect. The prospective purchaser again returned to the premises with her in February of 1963, and Mr. Backes again appeared upon the scene and again advised her that she could not show this property to anyone. Mrs. Gorney apprised Mr. Bender with respect to

this second incident. Subsequently the prospect again called her, but she indicated her reluctance to show the property and become involved in any difficulties between Mr. Backes and Mr. Bender. Significantly, Eleanor Gorney dropped the negotiations. Furthermore, Mr. Bender knew the name of the prospect and could easily have contacted him. It was not the prospect that was discouraged; it was the sales agent who refused to follow through on the negotiations. Further, Mr. Bender was free to pick up the negotiations. Apparently he chose not to do so. The proof does not support a finding that the prospect and the Benders would have entered into an agreement except for the conduct of Mr. Backes. On the contrary, the proof supports a finding that the agent and Mr. Bender abandoned the negotiations with the prospect.

In July, 1959, Mr. Backes on behalf of plaintiff filed a petition of appeal with the Essex County Board of Taxation, seeking a reduction in the tax assessment for the subject property. In that petition, under oath, he stated that "* * * the building is reputed to be over 80 years old, and requires continuous repairs. The heating, repairs. The investment does not show us a profit." This statement does not indicate scienter respecting tenement house violations. (As already noted in connection with alleged housing violations, defendants rely upon an alleged breach of covenant and not fraud.) Nor does the statement indicate any fraud on the part of Mr. Backes when he made the observation to Mr. Bender in the course of negotiations that the property was a "money-maker". Mr. Backes' investment in the property was not disclosed. The statement that the property was a "money-maker" was nothing more than a mere salesman's puff, not to be relied upon; and in any event I do not believe defendants relied upon such a statement in entering into the contract.

I conclude that defendants are entitled to a recovery on their counterclaim for damages to the extent of $4,000, and that the testimony fails to justify any award of punitive damages to the defendants.

The parties stipulated a balance due on plaintiff's mortgage in the amount of $29,600. Defendants, however, contend that they did not default in the terms of said mortgage. The mortgage specifically calls for a payment of interest and principal in the sum of $275.00, beginning August 1, 1960. Defendants contend that at the time of the filing of the complaint they were not in default in the making of such monthly payments. It is unnecessary to resolve this issue, since the mortgage specifically provided for the payment by the mortgagor of all taxes levied upon the lands embraced by the mortgage.

At the time of the filing of the complaint, the taxes for the year 1961 and the first half of 1962 were unpaid and defendants failed to prove that plaintiff waived such tax payments. The plaintiff has elected that the whole principal sum with unpaid interest be due as a result of said default. Such election is given the mortgagee by the provisions of the mortgage agreement. Defendants further urge that the complaint is false in that it also alleges taxes for the year 1959 remain unpaid, and that such allegation should bar plaintiff from any relief. Assuming the misstatement, this is no basis for barring plaintiff's right to foreclose.

The mortgagee has been in possession of the subject premises since July 1962. The parties agree that its account through September 30, 1963, be allowed as showing a balance on hand in the sum of $1,688.32. This amount, plus the sum of $4,000 heretofore allowed defendants by way

of damages, making a total of $5,688.32, will be set off against the sum of $29,600, the agreed amount due on the mortgage. I therefore fix the net balance due and owing plaintiff on the mortgage as of September 30, 1963, in the amount of $23,911.68.

Plaintiff seeks interest at the rate provided for in the mortgage, six per cent. The period for which interest is to be computed runs from June 10, 1962, until the date of the entry of judgment. Although the amount fixed as due on the mortgage will be reduced by the net receipts collected by plaintiff while in possession, such sum does not affect the amount of interest. *Brown* v. *Berry*, 89 N. J. Eq. 230 at 236. However, the Court has determined that defendant is entitled to set off $4,000, representing the loss occasioned by Mr. Backes' misrepresentations as to the fuel bills. It appears inequitable to permit interest to accrue on this sum of $4,000, which sum was owed, because of fraudulent misrepresentations. From the foregoing, I find that plaintiff is entitled to interest at six per cent from June 10, 1962, on $25,600 to date of entry of judgment. Counsel fees will be allowed plaintiff as provided for in R.R. 4:55-7(c). A form of judgment consistent with the views herein expressed will be presented, consented to as to form, or to be settled on notice.

APPENDIX B

Opinion of the Superior Court of New Jersey, Appellate Division

(September 24, 1965)

Before: CONFORD, KILKENNY and LEONARD, Judges.

PER CURIAM:

In the light of the record of this case, the ultimate conclusions of the Chancery Division as to each of the points raised on this appeal are adequately supported by the opinion rendered therein. Judgment affirmed.

APPENDIX C

Order of the Supreme Court of New Jersey Denying Petition for Certification and Dismissing Appeal

(February 16, 1966)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered same,

It is hereupon Ordered that the petition for certification is denied, with costs, and the appeal filed herein is dismissed.